Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1765

In The Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

HAROLD R. TYLER, JR.
Attorney for the American Society of Mechanical Engineers, Inc.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Of Counsel:
RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

QUESTIONS PRESENTED

1. Whether a non-profit, voluntary membership organization is strictly liable under the antitrust laws for all acts of its volunteer members within the scope of their "apparent authority," when (a) the acts are neither authorized nor ratified by the organization, (b) the members did not intend to, and did not in fact, benefit the organization by their actions, and (c) the members actively deceived the organization for their own purposes and for another's benefit.

2. Whether a non-profit, voluntary membership organization may be found liable for "unintentional participation" in a conspiracy to restrain trade and to monopolize, in violation of Sections 1 and 2 of the Sherman Act, on a theory of negligence.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Statute Involved	1
Statement Of The Case	2
A. The Parties	2
1. The American Society of Mechanical Engineers	2
2. Hydrolevel Corporation	3
3. Other Defendants	3
B. The Facts	4
Synopsis	4
1. The Low-Water Fuel Cut-Off	4
2. ASME's Procedures	5
3. The April 29, 1971 Letter	7
4. Misuse of the April 29, 1971 Letter by M&M	9
5. Hydrolevel Complains	10
6. The June 9, 1972 Letter	10
C. The Complaint, The Trial, and the Court of Appeals' Opinion	13
1. The Complaint	13
2. The Trial	13
3. The Court of Appeals' Opinion	14

PAGE

SUMMARY OF ARGUMENT 17

ARGUMENT:

POINT I: An Organization Should Not Be Held Strictly Liable Under The Antitrust Laws Based Solely On The Acts Of Disloyal Agents Who Did Not Intend To Benefit The Organization 20

A. The Panel's Decision Is Contrary to Prior Decisions of This Court Requiring Actual Authority or Ratification for a Voluntary Organization to Be Held Liable for an Agent's Acts in Violation of the Antitrust Laws 21

B. The Court Below Deviated From Established Precedent That Requires an Intent to Benefit an Organization for It to Be Liable for an Agents Acts 24

C. The Panel's Decision Erroneously Applies Agency Principles of Vicarious Liability 27

POINT II: The Court Of Appeals Erred In Upholding Antitrust Liability On The Basis Of Negligent "Unintentional Participation" In An Antitrust Conspiracy 36

POINT III: The Panel's Decision Is Also Wrong As A Matter Of Policy And Will Have A Disastrous Effect On Many Voluntary Organizations Which Serve The Public Interest 43

CONCLUSION 47

TABLE OF AUTHORITIES

CASES	PAGE
Addyston Pipe & Steel Co. v. *United States*, 175 U.S. 211 (1899)	38
Albrecht v. *Herald Co.*, 390 U.S. 145 (1968)	20
American Telephone and Telegraph Co. v. *Delta Communications Corp.*, 408 F. Supp. 1075 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978), *cert. denied sub nom. Delta Communications Corp.* v. *National Broadcasting Co.*, 444 U.S. 926 (1979)	39
American Tobacco Co. v. *United States*, 328 U.S. 781 (1946)	37, 39
Arthur v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1937)	25
Asphalt Industries, Inc. v. *Commissioner*, 384 F.2d 229 (3rd Cir. 1967)	28-29
Bankers Life Insurance Co. of Nebraska v. *Scurlock Oil Co.*, 447 F.2d 997 (5th Cir. 1971)	32, 34
Bigelow v. *RKO Radio Pictures, Inc.*, 150 F.2d 877 (7th Cir. 1945), *rev'd*, 327 U.S. 251 (1946)	33
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962)	29
Bruce's Juices, Inc. v. *American Can Co.*, 330 U.S. 743 (1947)	33
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	29
Calderone Enterprises Corp. v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972)	33
Community Bank, Lake Oswego v. *Bank of Hallandale and Trust Co.* 482 F.2d 1124 (5th Cir. 1973)	29

CASES	PAGE
Coronado Coal Co. v. *United Mine Workers*, 268 U.S. 295 (1925)	*passim*
Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911)	38
DuPont Glore Forgan Inc. v. *American Telephone and Telegraph Co.*, 437 F. Supp. 1104 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2nd Cir.), *cert. denied*, 439 U.S. 970 (1978)	39
E. A. McQuade Tours, Inc. v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973)	41
Eastern States Retail Lumber Dealers Ass'n. v. *United States*, 234 U.S. 600 (1914)	41
Elgie & Co. v. *S.S. "S.A. Nederburg,"* 74 Civ. 5112 (GLG), Slip op. (S.D.N.Y. Aug. 30, 1978)	31
Fashion Originators' Guild of America, Inc. v. *FTC*, 312 U.S. 457 (1941)	38, 41
First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253 (1968)	40
Gartin's Grocery v. *Lucas County Co-operative Creamery Ass'n*, 231 Iowa 204, 1 N.W.2d 275 (1941)	30
Gleason v. *Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929)	30-32, 46
Hansen Packing Co. v. *Armour & Co.*, 16 F. Supp. 784 (S.D.N.Y. 1936)	33
Hanson v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977)	39
Hatley v. *American Quarter Horse Association*, 552 F.2d 646 (5th Cir. 1977)	41
Hooper-Holmes Bureau, Inc. v. *Bunn*, 161 F.2d 102 (5th Cir. 1947)	27

CASES	PAGE
Hydrolevel Corporation v. *The American Society of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980)	*passim*
International Railways of Central America v. *United Brands Co.*, 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976)	39, 40
Interstate Circuit v. *United States*, 306 U.S. 208 (1939)	41
Investors Funding Corp. of New York, In Re, Fed. Sec. L. Rep. (CCH) ¶ 97,696 (S.D.N.Y. 1980)	26
Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)	20, 37
Klor's Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)	20, 38
Loom Crafters, Inc. v. *New Central Jute Mills Co. Ltd.*, 1971 Trade Cases (CCH) ¶ 73,734 (S.D.N.Y. 1971)	40
Lucas v. *Ligett & Myers Tobacco Co.*, 50 Hawaii 477, 442 P.2d 460 (1968)	30
Lyons v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955)	33
Maple Flooring Manufacturers Association v. *United States*, 268 U.S. 563 (1925)	41
Michelman v. *Clark-Schwebel Fiber Glass Corp.* 534 F.2d 1036 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976)	39, 40
Miller v. *Schweickart*, 413 F. Supp. 1062 (S.D.N.Y. 1976)	39
Modern Home Institute, Inc. v. *Hartford Accident and Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975)	39
Moscarelli v. *Stamm*, 288 F. Supp. 453 (E.D.N.Y. 1968)	26

CASES	PAGE
National Auto Brokers v. *General Motors Corp.* 572 F.2d 953 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979)	39
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978)	20
Oman v. *United States*, 179 F.2d 738 (10th Cir. 1949)	26, 30-31
Poller v. *Columbia Broadcasting System Inc.*, 368 U.S. 464 (1962)	40
Radiant Burners, Inc. v. *Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961)	20, 38
Ricketts v. *Pennsylvania Ry. Co.*, 153 F.2d 757 (2d Cir. 1946)	29
Ripon Knitting Works v. *Railway Express Agency*, 207 Wis. 452, 240 N.W. 840 (1932)	30
Ruidoso Racing Ass'n., Inc. v. *Commissioner*, 476 F.2d 502 (10th Cir. 1973)	26, 31
Schoenbaum v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969)	25-26
Sennott v. *Rodman & Renshaw*, 474 F.2d 32 (7th Cir.), *cert. denied*, 414 U.S. 926 (1973)	28
Shrier v. *Morrison*, 357 P.2d 196 (Sup. Ct. Okla. 1960)	30
Silver v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963)	20
Slade v. *Shearson, Hammill & Co., Inc.*, 79 F.R.D. 309 (S.D.N.Y. 1978)	26
Standard Oil Co. of Texas v. *United States*, 307 F.2d 120 (5th Cir. 1962)	26
Steere Tank Lines Inc. v. *United States*, 330 F.2d 719 (5th Cir. 1963)	26

CASES	PAGE
Structural Laminates Inc. v. *Douglas Fir Plywood Association*, 261 F. Supp. 154 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969) ..	41
Texas Industries v. *Radcliff Materials Inc.*, ___ U.S. ___, 49 U.S.L.W. 4537 (May 26, 1981)	33
Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951)	38
Truck Drivers Local No. 421 v. *United States*, 128 F.2d 227 (8th Cir. 1942)	23, 24
United Mine Workers of America v. *Coronado Coal Co.*, 259 U.S. 344 (1922)	*passim*
United States v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).....	24, 34
United States v. *The American Society of the Mechanical Engineers, Inc. and National Board of Boiler and Pressure Vessel Inspectors*, 1972 Trade Cases (CCH) ¶ 74,028 (S.D.N.Y. 1972).....	46
United States v. *Beusch*, 596 F.2d 871 (9th Cir. 1979)	26
United States v. *Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978)	25
United States v. *General Motors Corp.*, 384 U.S. 127 (1966).....	37, 38
United States v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom. Western International Hotels Co.* v. *United States*, 409 U.S. 1125 (1973)	24, 33-34
United States v. *Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966).....	31-33, 46
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).....	20, 38

CASES	PAGE
United States v. *Standard Oil Company*, 316 F.2d 884 (7th Cir. 1963)	39
United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972)	20, 38
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978)	38
STATUTES	
Clayton Act, Section 4, 15 U.S.C. § 15	*passim*
Internal Revenue Code § 501(c)(3)	2
N.Y. Donnelly Act, § 340 (McKinney's 1968)	13
Sherman Act, Section 1, 15 U.S.C. § 1.	*passim*
Sherman Act, Section 2, 15 U.S.C. § 2.	*passim*
28 U.S.C. § 1254(1)	1
OTHER AUTHORITIES	
2 Areeda & Turner, *Antitrust Law* (1978)	33
DeTocqueville *Democracy in America*, (Mentor ed. 1956)	44
Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety and Health," 56 *Texas L. Rev.* 1329 (1978)	44
Hogan, "In Defense of Voluntary Products Standards," *MBA*, (April 1978)	44
Lange, "Steps to American Standards," *Association Management* 6 (August 1965)	44
Office of Management and Budget Circular No. A-119, 45 Fed. Reg. 4326 (January 21, 1980)	44
Restatement (Second) of Agency (1958)	*passim*
Seavey, *Agency* (1964)	29, 31
Wachtel, "Products Standards and Certification Programs," 13 *Antitrust Bulletin* 1 (1978)	44

No. 80-1765

In The Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner,*

v.

HYDROLEVEL CORPORATION, *Respondent.*

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980) and also appears in the Appendix to ASME's petition for a writ of certiorari at pages A-1 to A-26. The District Court filed no opinions on issues raised in this brief.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1980. A timely petition for rehearing, and suggestion of rehearing *en banc,* was filed by ASME on December 15, 1980. The petition and suggestion were denied on January 22, 1981. *See* page A-27 to ASME's petition for a writ of certiorari. ASME's petition for a writ of certiorari was filed on April 22, 1981 and granted on June 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This suit involved application of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, which are set forth at page A-28 to ASME's petition for a writ of certiorari.

STATEMENT OF THE CASE

A. The Parties

1. ***The American Society of Mechanical Engineers.*** ASME is one of the oldest and largest scientific and technical societies in the United States. It was organized in 1880 as a non-profit membership corporation and is exempted from federal taxation under § 501(c)(3) of the Internal Revenue Code. ASME conducts educational and research programs, publishes a national magazine and a number of research journals, and sponsors or co-sponsors a number of technical conferences—all devoted to the dissemination of information intended to enhance the use of mechanical engineering in the public interest.

Since shortly after its founding, ASME has also promulgated and published codes and standards in numerous areas of scientific and engineering concern. There are now more than 400 such separate codes. While ASME codes are advisory only and are not of themselves binding on anyone, many such codes have been incorporated by reference into the laws of governmental jurisdictions, including federal regulatory entities, most states, major cities, and all of the provinces of Canada. *See, e.g.,* PX 30A at Exh. H (App. 666).*

---

* "PX" refers to a plaintiff's exhibit before the District Court; "DX" refers to a defendant's exhibit. Citations to the trial transcript are to the Appendix ("App.") submitted to the Court of Appeals; the official trial transcript appears at App. 80-1753. If an exhibit is reprinted in the Joint Appendix ("J.A.") submitted to this Court, the reference will be to the pages of the J.A. at which it appears. Pursuant to Court Rule 34.5, the first time that an exhibit is cited, it is followed by a citation in parentheses that includes: (1) its PX or DX number, if the exhibit appears in the J.A.; (2) the page, if any, in the Exhibit Volumes ("AX V." and "HX V.") submitted to the Court of Appeals where the exhibit is reproduced; and/or (3) the pages in the trial transcript where the exhibit was offered into evidence and, if different, also where the exhibit was admitted into evidence or otherwise ruled on by the trial judge. Subsequent citations to an exhibit will be, as appropriate, solely to pages of the J.A. or the Exhibit Volumes, if the exhibit appears in either, or to the exhibit itself if it does not.

ASME presently has more than 100,000 members, drawn from all fields in which mechanical engineers are active, including industry, academia, government, consumer groups, insurers, and other scientific and technological societies. ASME has no corporate members and all ASME members participate solely as individual professionals and not as representatives of their employers. App. 615-42. Over 10,000 volunteer members, through various committees and subcommittees, participate in writing, revising and interpreting ASME's codes, which they do as a public service without pay. A paid staff is employed to handle administrative duties.

2. ***Hydrolevel Corporation.*** Respondent Hydrolevel Corporation ("Hydrolevel") was formed in 1965 to manufacture and distribute a low-water fuel cut-off, a safety device used in virtually all water and steam boilers. Hydrolevel entered a market already shared by five established manufacturers (App. 153-74; DX BN, p.4 (App. 956-57)), never achieved significant market penetration and never operated at a profit. DX CH (AX V. 161-66; App. 956). In early 1979, the company sold all of its assets (except this lawsuit) for $86,000 "salvage" value. App. 246.

3. ***Other Defendants.*** In addition to ASME, the complaint originally named two other defendants, McDonnell & Miller, Inc. ("M&M") and Hartford Steam Boiler Inspection and Insurance Company ("Hartford").

M&M has been the country's leading manufacturer of low-water fuel cut-offs for nearly half a century, accounting for 70-85% of all sales annually. In December 1971, M&M was acquired by International Telephone & Telegraph Corporation ("ITT"), which thereafter operated M&M as part of an operating division. Hartford is the country's leading underwriter of boiler insurance.

Prior to trial, ITT (M&M) and Hartford settled the charges against them for $725,000 and $75,000, respectively, and an amended complaint was filed naming ASME as the sole defendant.

B. The Facts

Synopsis. This case focused on the issuance by ASME, and subsequent misuse by M&M, of an "unofficial" interpretation of one paragraph of one of ASME's over 400 codes. The interpretation letter, which involved a particular safety standard relating to low-water fuel cut-offs, was concocted by two employees of M&M and Hartford, John James and T.R. Hardin, who also served as volunteer members of an ASME subcommittee. The Court of Appeals found that James and Hardin deliberately caused ASME to issue a misleading letter in order to help M&M to disparage one of Hydrolevel's products and thereby gain a competitive advantage. The facts at trial showed, and the Court of Appeals assumed for purposes of its decision, that no one connected with ASME other than James and Hardin had any knowledge of the letter's purpose or hidden significance, that James and Hardin did not intend to benefit ASME by their acts, and that, in obtaining the letter, James and Hardin not only concealed their true motives from ASME but acted disloyally to ASME. Nevertheless, the Court of Appeals held ASME liable under the antitrust laws as an "unintentional" conspirator against Hydrolevel solely because the acts of the two disloyal volunteer members were within the scope of their "apparent authority" on behalf of ASME. Based on this legal reasoning, it affirmed a jury's finding of liability against ASME, although remanding for a new trial on damages.

1. ***The Low-Water Fuel Cut-Off.*** Boilers generally include a device that automatically cuts off the fuel supply—and thus shuts down the boiler—before the water in the boiler falls to a dangerously low level. If a cut-off device fails to operate, it may result in "dry firing"—that is, operation of the boiler without a sufficient supply of water to moderate temperature. Dry firing can result in an explosion causing injury to persons or property. App. 169, 928.

For many years, M&M manufactured a mechanically operated cut-off which functioned on a "float" principle. If the water in a boiler drops below a critical level, a float cut-off falls, tripping a switch that cuts off the fuel supply.

Hydrolevel manufactured an electrically activated cut-off of the so-called "probe" variety. With a probe type cut-off, when water in the vessel maintains a certain level, water covers an electrode, thus completing a circuit activating the fuel supply. If the water falls below the electrode, the circuit is broken and the fuel supply is cut off. One difficulty with the probe cut-off is that, when used in a steam boiler, bubbling or surging of the boiling water may intermittently activate the cut-off and cause rapid fluctuations in the fuel supply. Since such fluctuations can damage a boiler or disrupt service, certain Hydrolevel models for residential steam boilers incorporated a time-delay element to insure that mere fluctuations in water level would not cut off the fuel supply. App. 161-62; DX BN, pp. HT1268-9.

2. ***ASME's Procedures.*** One of the over 400 codes and standards promulgated and published by ASME is the approximately 18,000 page Boiler and Pressure Vessel Code (the "B-PV Code"), which sets standards of performance for various components of steam and water boilers, pressure vessels, and similar objects. App. 611. The B-PV Code was first promulgated in the early part of the twentieth century when boiler explosions caused by inadequate safety precautions frequently caused death, injury and property damage. App. 928-29. Section IV of the eleven section B-PV Code, which deals specifically with heating boilers, has been adopted in 46 states and all but one Canadian province. PX 30A at Exh. H, pp. 2-3. Since the promulgation and acceptance of the B-PV Code, personal injuries and major property damage caused by boiler explosions have been virtually eliminated. App. 929.

For many years, ASME has regularly provided written or oral interpretations of its codes. App. 646. These interpretations are offered free of charge as a public service. They are available to members and non-members alike. Under the procedures set forth in its bylaws, requests for interpretation are referred to the relevant ASME committee responsible for the code in question. The committee, following its own internal procedures, may respond to properly worded inquiries in writing. ASME regularly receives approximately

20-30,000 such inquiries per year regarding the B-PV Code alone. App. 861.

The Boiler and Pressure Vessel Committee (the "B-PV Committee") is responsible for supervising and interpreting the B-PV Code and, in turn, maintains the Section IV Subcommittee (also called "the Heating Boiler Subcommittee") responsible for that sub-section of the B-PV Code. The Section IV Subcommittee is one of twelve subcommittees, thirty-five subgroups and seven working groups maintained by the B-PV Committee. PX 9B at Appendix IV (AX V. 201-04; App. 564-65).

Under §§ 8.01 and 8.02 of the B-PV Committee's procedures, questions directed to that Committee may be answered by the staff secretary or referred to the appropriate subcommittee chairman. AX V. 183-85, 208-10. In some instances in which responses to similar inquiries are on file, the secretary may simply reply based upon such previous answers. Alternatively, in such instances or when a new question can be answered by direct reference to the B-PV Code, the chairman of the relevant subcommittee may outline the reply to be sent by the secretary as an "unofficial communication." Such drafts also are regularly forwarded to the B-PV Committee Chairman and Vice-Chairman for review and comment. App. 867; AX V. 209. Under ASME's procedures, only an inquiry which could not be answered by direct reference to the Code would be referred to a full Subcommittee for consideration and then reviewed and answered by the B-PV Committee in developing an "official" response. AX V. 184 (§ 8.02(b)), 205, 210.

With respect to devices such as cut-offs, ASME concerns itself solely with standards of performance—that is, abstract principles of acceptable levels of safe operation. Under its procedures, neither ASME nor its committees approve, recommend or endorse proprietary or specific designs. App. 642-45, 656; AX V. 184 (§ 8.01 (c), (d)), 191-92. Letters of inquiry which can only be answered by addressing the acceptability of a particular device or design are not answered

by ASME, but are referred to regulatory organizations for response. AX V. 191-92; App. 732-33.

3. ***The April 29, 1971 Letter.*** In March 1971, James Solon, President of M&M, Eugene Mitchell and John James, Vice-Presidents of M&M, and T.R. Hardin, a Vice-President of Hartford, met over dinner in Chicago to discuss various matters. At that time, James and Hardin were also active as volunteers in ASME activities, Hardin as Chairman and James as Vice-Chairman of the Section IV Subcommittee. Among other matters, those present at the Chicago dinner discussed the possibility of requesting from ASME advice on whether a cut-off could meet ASME standards if it included a time-delay. PX 16a, pp. 787-92, 823-25 (App. 499-500); PX 18A, pp. 382-89 (App. 498-99); PX 14, p. 133 (App. 569-70). James and Hardin thereafter consulted about the wording of the request. PX 16a, pp. 877, *et seq.*

On April 12, 1971, Mitchell of M&M directed a letter, drafted by James, to W. B. Hoyt, staff secretary of the B-PV Committee. J.A. 62 (PX 38; AX V. 1; App. 215-16). The letter inquired whether paragraph HG-605 of B-PV Code Section IV permitted the incorporation of a time-delay feature in a cut-off so that the cut-off would operate only after the boiler water level fell below the required level for automatic, safe cut off. It stated:

> "Par. HG-605 of Section IV states that each automatically fired steam or vapor-system boiler shall have an automatic low-water fuel cut-off so located as to *automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass.* Is it the intent of this statement that the cut-off operate immediately when the boiler water level falls to the lowest visible part of the water-gauge glass, or is it permissible to incorporate a time-delay feature in the cut-off so that it will operate *after the boiler water level reaches some point below the visible range of the gauge glass?*"

Id. (emphasis added). In order to assure an adequate supply of water covering the heating element, B-PV Code standards

provide that a glass gauge be placed on heating boilers so that one can visually determine the amount of water in the boiler. PX 30A at Exh. A, ¶ HG-602(b) (AX V. 8-9; App. 666). When the water falls below the visible portion of a properly placed gauge, that event signals a potentially dangerous level of water. Paragraph HG-605(a) requires that a cut-off be so located as automatically to cut off the fuel supply when the surface of the water falls to the lowest visible part of the gauge glass. PX 30A at Exh. A, ¶ HG-605(a) (AX V. 2).

Following standard procedures, the letter was referred by Hoyt, who had no expertise in this particular aspect of heating boilers, to Hardin, as Chairman of the appropriate Subcommittee. App. 863-65, 903-04; AX V. 6. Hardin composed a draft reply, which he sent to Hoyt, as well as to the Chairman and Vice-Chairman of the B-PV Committee. J.A. 63 (PX 18C at Exh. 5; AX V. 7; App. 573).

On April 29, 1971, Hoyt routinely responded to the M&M inquiry by forwarding the "advice" of the Subcommittee Chairman, adopting Hardin's language in an "unofficial" response. J.A. 64 (PX 39; AX V. 10; App. 157-58). In essence, the reply stated "it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass," and that, without more, a time delay feature which operated after the water had left the gauge glass would provide "no positive assurance that the boiler water level would not fall to a dangerous point during the time delay." Specifically, the letter stated:

> "The inquiry contained in your letter of April 12, 1971 was referred to the Chairman of the concerned Subcommittee who offers the following advice:
>
> > "A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and

positively when the boiler water level falls to the lowest visible part of the water gauge glass.

"There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period."

This advice, of course, was nothing more than a straightforward interpretation of the B-PV Code itself in response to the limited inquiry posed. Mitchell had asked only if it were permissible to incorporate a time-delay feature which operated *after* water had left the safety gauge glass. The reply simply noted the requirements of the B-PV Code and stated the self-evident conclusion that any construction such as that posited in the inquiry, which permitted operation of a time-delay after water was already below the minimum gauge glass level, would provide no assurance that the water would not fall to a dangerous point during the time-delay. In accordance with ASME procedures, the letter made no mention of any manufacturer or proprietary device.

4. ***Misuse of the April 29, 1971 Letter by M&M.*** Notwithstanding the extremely limited nature of the April 29 letter, officials of M&M proceeded to misuse the letter in promotional efforts, deliberately (and without ASME's knowledge) representing to consumers that it specifically applied to the Hydrolevel proprietary device. In particular, M&M included in a booklet for its sales representatives, called "The Opposition—Who They Are, How to Beat Them," an erroneous statement regarding Hydrolevel's product that "a time delay of any kind in the firing device circuitry would very definitely be against the ASME Code...." PX 18C at Exh. 10 (AX V. 13); *see also* AX V. 11-20; A-8. In addition, M&M officials made similar statements to potential customers to persuade them not to buy the Hydrolevel device. *See, e.g.*, PX 13, pp. 139-43 (App. 568). There was, however, absolutely no evidence that ASME participated in or was even aware of these misleading promotional efforts by

M&M until after Hydrolevel brought the matter to its attention in early 1972.

5. ***Hydrolevel Complains.*** In January 1972, Dominick DeLeonardis, Vice-President of Hydrolevel, apparently learned for the first time that potential customers had been told about ASME's April 29 letter, as misinterpreted by M&M. App. 186-87. On the same date, he wrote to Hoyt of ASME, asking for a copy of the letter. J.A. 65 (PX 40; AX V. 21; App. 215). On February 8, 1972, ASME responded to DeLeonardis quoting in full the substantive provisions of the April 29 letter. J.A. 66-67 (PX 41; AX V. 22; App. 215). In conformity with a strict ASME policy affording anonymity to inquirers, the February 8, 1972 reply did not indicate that the initial inquiry prompting the April 29 letter came from M&M.

Thereafter, on March 23, 1972, Russell Rymer, President of Hydrolevel, directed a lengthy complaint to Mr. Hoyt and all B-PV Committee and Section IV Subcommittee members. J.A. 68-73 (AX V. 29-37).* This letter set forth Hydrolevel's experience with the dissemination of the misinterpretation of the April 29 letter and requested that ASME issue a statement that would "make it very clear that the low water cutoffs having time delay features are indeed acceptable under the Code," and "circulate [such] a correcting statement generally among all who might reasonably have become privy to your letter." J.A. 73.

6. ***The June 9, 1972 Letter.*** Promptly upon receipt of Rymer's letter, ASME placed the matter on the agenda for the next meeting of the Heating Boiler Subcommittee and the B-PV Committee, to be held on May 4 and 5, 1972 in Minneapolis. Hydrolevel was informed of this schedule but, despite the fact that all ASME committee and subcommittee meetings are open to the public without restriction and that even non-members have an opportunity to participate in debate, it did not send a representative. J.A. 76-81 (DX Y-1, Y-2; AX V. 40-45; App. 623-24).

* This exhibit was admitted into evidence between PX 41 and PX 42, at App. 216-17, but apparently was not separately numbered.

On May 4, 1972, the Section IV Subcommittee met with over 60 people in attendance. J.A. 76-77; App. 637-41. Among numerous other matters, Rymer's complaint came before the meeting, at which point James—who was now acting Chairman of the Subcommittee—voluntarily relinquished the chair and did not participate in the discussion. PX 16a, pp. 1074-76, 1094; App. 742-44. The Subcommittee recommended that the intent of the first substantive paragraph of April 29 letter be reaffirmed, that it be emphasized—precisely in accordance with Hydrolevel's request—that time-delays *per se* did not violate the B-PV Code, and that the B-PV Committee consider drafting an appropriate reply. PX 16B at pp. HS 503, 524 (AX V. 58-59; App. 570, 591); J.A. 82-83 (PX 16B at Exh. 28, pp. AS 43-44; AX V. 46-47).

On May 5, 1972, in accordance with ASME procedures, James—as acting Chairman of the Subcommittee—reported to the B-PV Committee the approximately 30 decisions reached the day before by the Subcommittee. Included in that report was the Subcommittee's recommendation on the Rymer complaint. PX 16a, pp. 1092-94; J.A. 82-83. With over 120 people in attendance (J.A. 78-81), the B-PV Committee discussed the matter at length and voted (1) to reaffirm the express requirement of the B-PV Code that any cut-off device must operate to shut down a boiler when water falls to the lowest visible part of the gauge and (2) to emphasize that this requirement does not in itself bar the use of time-delay devices. The Chairman of the B-PV Committee appointed a special task force to draft a response incorporating this position. App. 828-31.

The two task force members then exchanged several drafts of the proposed response (PX 30L, pp. 2-5 (AX V. 48-51; App. 666)), which in substance constituted the eventual June 9, 1972 "official" clarification letter. J.A. 84 (PX 45; AX V. 77; App. 216); *see also* A-23. Thereafter, James unilaterally wrote to the task force suggesting a semantic change in the last paragraph of the proposed response. PX 16B at HS 340 (AX V. 52); PX 16a, pp. 1132-33, 1150-51. While this suggested language was adopted by the task force

chairman* (PX 30L, pp. 6-7 (AX V. 53-54)), it had no significant impact on the unambiguous clarification statement that the task force produced. The letter specifically advised Hydrolevel that "there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays. . . ." J.A. 84; *see also* A-23.

Thereafter, the draft was circulated with the minutes of the May 5 meeting to over 300 individuals active in the boiler market, clearly conforming with Rymer's requested circulation of a "correcting statement". J.A. 73; App. 673, 837; *see* p. 10, *supra.* In accordance with ASME procedures, all Committee votes had to be in favor of the minutes before the letter could be sent (AX V. 75-76); no one registered an objection and the June 9 letter was sent to Hydrolevel. App. 858-59. Thereafter, Hydrolevel privately expressed complete satisfaction with ASME's June 9 letter and distributed it to customers and potential customers. App. 294; DX BM-1 (AX V. 78-79; App. 288-89); *see also* A-23.

Although Hydrolevel could have appealed the June 9, 1972 response to ASME's Policy Board on Codes and Standards had it been dissatisfied with either its contents or the procedures leading to its issuance (App. 818-19), it did not do so and, in fact, never communicated directly with ASME following the issuance of the June 1972 letter. Instead, over three years later, finding that it still could not succeed in penetrating the cut-off market against well-established and better funded competitors, Hydrolevel filed this suit on August 19, 1975.

---

* The task force was chaired by the Executive Director of the National Board of Boiler and Pressure Vessel Inspectors, the umbrella group for governmental regulatory entities responsible for overseeing the compliance of proprietary devices with applicable codes and standards. He thus was well-versed in the underlying safety requirements and technical issues, and had no possible self-interest. App. 831, 732-33.

C. The Complaint, The Trial, and The Court of Appeals' Opinion

1. ***The Complaint.*** In the form in which it was presented to the jury,* the amended complaint charged that ASME conspired with ITT/M&M and Hartford to restrain trade in violation of Section 1 of the Sherman Act and to monopolize the low-water cut-off market in violation of Section 2. J.A. 19-22. Hydrolevel's apparent theory was that through issuance and misuse of the April 29, 1971 letter, ASME, ITT/M&M and Hartford conspired to eliminate Hydrolevel as a potential market force in the cut-off market.

2. ***The Trial.*** During the presentation of its case, Hydrolevel proceeded on the theory that James and Hardin had devised a "loaded" question to be posed to ASME, and orchestrated an intentionally misleading response by ASME in the form of the April 29, 1971 letter. Hydrolevel's premise was that ASME expressly and intentionally participated in these acts and was thus liable for them. At the close of plaintiff's case, however, the trial judge expressly rejected this theory, ruling that there was insufficient evidence to show that ASME had knowledge of or was liable for the issuance of the April 29 letter:

> "If all you had was the original issue of the letter, and even a conference, I don't think I would let it go to the jury. After all, you can't have an organization like this held responsible where some businessman wants to use or abuse his position, given the best possible posture to the plaintiff's case. So even though M&M wanted to use your client [ASME] as a vehicle for getting some advantage, I don't think that is enough to hold you liable."

J.A. 34-35. Instead, the Court allowed the case to continue solely on a new and hitherto unexpressed theory that ASME

* Counts 2 through 4 of the amended complaint, based on state law charges, were voluntarily withdrawn prior to trial. They had alleged: violation of New York's Donnelly Act, Gen. Bus. L. § 340 (count 2); trade libel (count 3); and tortious interference with business relations (count 4).

might be liable for M&M's activities because it failed to take more effective steps when it first learned of them in 1972:

> ". . . But once having had the matter brought to its attention and having made clear to permanent employees of rather high rank that a possible injustice has been done it might be thought by the trade to indicate disapproval. It does seem to me that it can be argued that the failure at that point to take reasonable steps . . . to clarify the situation to the trade, it could be considered as an implicit joining of a conspiracy already entered into."

J.A. 35.

On January 30, 1979, the jury found that ASME had conspired to restrain trade in the cut-off market.* Several days later, after a separate trial on the question of damages, the jury found that Hydrolevel had suffered damages of $3.3 million. The trial judge reduced those damages by the $800,000 prior settlements to $2.5 million, trebled that, and entered a judgment for $7.5 million. ASME appealed from the liability verdict and damage assessment. Hydrolevel cross-appealed from the trial judge's deduction of settlements before trebling and decision not to grant attorneys' fees.

3. ***The Court of Appeals' Opinion.*** On appeal to the United States Court of Appeals for the Second Circuit, the parties focused on two theories of liability. First, ASME argued that there was no evidence that it intentionally or deliberately participated in a conspiracy to restrain trade or to monopolize; Hydrolevel, on the other hand, contended that ASME's handling of the April 29, 1971 letter showed that it was an active and knowing participant. Second, Hydrolevel

---

* Although rejected by the Court of Appeals as grounds for reversal (A-19 to A-21), the jury's verdict may have been influenced by several prejudicial factors. First, the court had allowed to be admitted into evidence, ostensibly for limited purposes, a *Wall Street Journal* article (J.A. 94-98 (PX 5 at p. AS-32 and Exh. 13; AX V. 87; App. 563, 573, 590-91. 1186)), which summarized Hydrolevel's allegations and which concluded by suggesting that the Federal Trade Commission felt that this was a matter for rectification by a court. Second, the summation and rebuttal summation by Hydrolevel's counsel were highly emotional and replete with misstatements of the record. *See* ASME Brief to the Court of Appeals at 37-42.

argued—and ASME disputed—that ASME's reaction to the discovery of the circumstances surrounding the April 29, 1971 letter constituted a *post hoc* "ratification" of the conspiratorial acts. The first theory had been rejected by the trial judge at the close of the plaintiff's case; with respect to that theory, ASME argued that under normal principles of agency law, it could not be held liable for the acts of disloyal volunteer members unless those members intended through their acts to benefit ASME. Regarding the second theory, ASME contended that there was simply no evidence that it had ratified or adopted any conspiratorial acts; rather, the only evidence showed that it had acted affirmatively to set the record straight when the misinterpretation was brought to its attention.

In its opinion, the panel of the Court of Appeals expressly did not reach either theory of liability, although in its damages section, it implicitly rejected Hydrolevel's "ratification" argument by holding that ASME had cured any adverse effect of the April 29, 1971 letter by publishing a full and fair correction of it on June 9, 1972.* Rather, the Court noted: "We need not resolve that dispute [between the two theories], for we hold that the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory."** A-13.

The panel acknowledged that "the appropriate theory for conventional torts" (A-13) is that a corporation is liable for the acts of its agents only if the agent intended to advance his

---

* The panel stated: "The June 1972 letter was a retraction of the April 1971 interpretation . . . As ASME's sole contribution to the conspiracy was the April 1971 letter, a suitable retraction of the misinterpretation in the April 1971 letter was all that was required to free it from further liability for any damages caused by the conspiracy." A-23.

** This holding is curious, in itself, since the jury instruction actually given did not differ in essence from that requested by Hydrolevel. First, the District Court's jury instruction "incorporated an apparent authority theory" in language virtually identical to that requested in Hydrolevel's Requested Charge No. 28. *Compare* J.A. 47 *with* J.A. 59. Second, Hydrolevel's Requested Charge—contrary to the panel's conclusion—included a requirement that an agent's "acts [be] done on behalf of a corporation" in order to be "within the scope of employment." J.A. 59.

employer's interest. It then decided that vicarious liability in federal antitrust cases should not be governed by this general rule, but rather that antitrust defendants are liable for all acts of their agents even when the agents act solely for their own purposes and actively deceive the principal. It concluded:

> "The conduct at issue here, however, is far closer to the torts discussed in [*Restatement (Second) of Agency*] § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement."

A-13. The Court reasoned that "[a] conspiracy to restrain trade is so similar to fraud, injurious falsehood, and tortious interference with business relations that application of the Restatement rules governing those torts is appropriate." A-15.

Thus, the Court of Appeals held that in federal antitrust cases, the standard for vicarious liability should be the broadest that appears in agency law, and that a principal is liable for all acts of its agents within the scope of their "apparent authority." It further held that the general rule requiring the agent to have intended to benefit the principal was inapplicable to antitrust cases and that vicarious liability under the antitrust laws is governed by an exceptional rule derived from specialized areas of tort liability. The Court thus affirmed ASME's liability for the acts of two of its volunteer members even while tacitly accepting that the organization had no knowledge of those agents' real motives, the agents did not intend to benefit the organization, and the agents actively deceived the organization in order to benefit themselves and their true principals (in this case, their employers):

> "For ASME to be liable . . . Hydrolevel had to demonstrate *only* that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part

to benefit ASME or that ASME later ratified their actions."

A-19 (emphasis added).

Indeed, the panel acknowledged that ASME's participation in the antitrust conspiracy was "unintentional" (A-26) and suggested that its decision was based on a theory of negligence. The panel stated that "[w]hile ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitors' product." A-16.

SUMMARY OF ARGUMENT

ASME is a non-profit, voluntary membership organization devoted to the promotion of the art and science of mechanical engineering. It conducts a broad array of programs and activities in the public interest, virtually all of which are made possible through the efforts of its volunteer members. In the instant case, two of ASME's more than 100,000 members conceived a scheme whereby, through a clever manipulation and distortion of one of ASME's programs, they were able to help one of their employers, M&M, gain a competitive advantage over another concern, Hydrolevel. It is clear, and the Court of Appeals tacitly accepted, that these two volunteers did not intend to benefit ASME and that, in fact, they acted in secret and disloyally to ASME in carrying out their scheme. They were, however, purportedly acting within the scope of their "apparent authority" in causing the April 29 letter to be issued by ASME, and for that reason—and that reason alone—the Court of Appeals held ASME liable as a participant in an antitrust conspiracy directed against Hydrolevel.

Petitioner submits that the Court of Appeals' decision is wrong as a matter of law. First, the panel's holding is contrary to prior decisions of this Court, which have expressly rejected "apparent authority" as a basis for holding a

voluntary organization liable under the antitrust laws for an agent's acts. In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922) and *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295 (1925), this Court determined that antitrust liability of a voluntary organization can be based on the acts of its members only if they had actual authority or the organization ratified their acts.

Second, the panel's opinion is contrary to every prior federal antitrust decision that has addressed the issue of agency liability. Without exception, those precedents hold that an agent must have intended to benefit his principal, at least in part, in order to bring his actions within the scope of his employment and render the corporate principal liable. Similarly, under federal regulatory statutes other than the antitrust laws, the federal courts have rejected the holding of the panel and have required a showing that the agent intended to benefit the principal as a prerequisite to finding the principal liable.

Third, the panel misapplied the agency principles of vicarious liability on which it purported to rely. It not only incorrectly summarized certain sections of the *Restatement (Second) of Agency* upon which it based its decision (which in fact support ASME's position and would have required reversal), but ignored the requirement of decisions based on "apparent authority" principles that the plaintiff directly rely on the agent's "apparent authority" from the defendant. Moreover, while this Court and other federal courts have in limited instances found that a corporate principal may be better able to bear the risk of an agent's perfidy and, thus, should make an injured party whole, that approach is inapplicable—and has never been applied—either to an action involving punitive damages or to a non-profit, public interest organization which logically cannot benefit from the agent's acts.

Furthermore, the panel erred in finding liability for "unintentional participation" in an antitrust conspiracy. This extraordinary holding, apparently based on a theory of negligence, is squarely inconsistent not only with the facts, but

with this Court's requirement of intentional, purposeful participation in an antitrust conspiracy. More fundamentally, Hydrolevel never met its burden of showing ASME's intentional participation in the curious conspiracy that it alleged. In the absence of any evidence of, or any conceivable motive for, ASME's active participation in that conspiracy, it follows not only that the judgment of the panel should be reversed, but that the case should be remanded with directions to dismiss the complaint.

Finally, in holding that voluntary associations like ASME may unintentionally participate in antitrust violations by virtue of the acts of disloyal volunteers, the Court of Appeals has adopted a rule that will seriously jeopardize the effectiveness of the entire voluntary sector. This holding subjects nonprofit, voluntary membership organizations to a form of liability against which they cannot protect themselves, short of simply abandoning many of their programs and activities in the public interest. Such a result is not only legally unprecedented, but is contrary to sound public policy.

In sum, the panel's decision is fundamentally flawed and there is simply no supportable basis for holding ASME liable under the circumstances of this case. The judgment of the Second Circuit panel should be reversed and the complaint dismissed.

ARGUMENT

POINT I

AN ORGANIZATION SHOULD NOT BE HELD STRICTLY LIABLE UNDER THE ANTITRUST LAWS BASED SOLELY ON THE ACTS OF DISLOYAL AGENTS WHO DID NOT INTEND TO BENEFIT THE ORGANIZATION

The plaintiff proceeded in the trial court on theories that ASME conspired with ITT/M&M and Hartford to exclude Hydrolevel from the cut-off market by means of a deliberately artificial interpretation of the ASME B-PV Code and that ASME acquiesced in M&M's misuse of that April 29, 1971 letter. Unlike virtually every decision involving a violation of Section 1 of the Sherman Act, this case does not involve an agreement among competitors,* an agreement among manufacturers and distributors,** or the activity of a trade association whose purpose is to foster, protect or regulate the interests of its members.*** Rather, the plaintiff asserted that ASME, a non-profit, public service organization with no corporate members, somehow decided to join with ITT, M&M and Hartford**** to keep Hydrolevel—a fledgling manufacturer against whom ASME had absolutely no adverse economic interest—from attempting to establish itself in the fuel cut-off market.

---

* *See, e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

** *See, e.g., Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

*** *See, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963); *Radiant Burners, Inc.* v. *People's Gas, Light & Coke Co.*, 364 U.S. 656 (1961).

**** Hydrolevel argued, and the Court of Appeals appeared to accept (A-5, n. 2), that ITT—which already owned a minority interest in Hartford—was negotiating to buy M&M in April 1971, which would supply a motive (otherwise completely lacking) for Hartford and Hardin to conspire to benefit M&M. In fact, the only evidence at trial was that the earliest "preliminary discussions" of M&M's acquisition by ITT occurred *after* the April 29 letter

The evidence at trial utterly failed to prove any active or intentional participation by ASME in this curious conspiracy, and the Court of Appeals ultimately noted that ASME's participation was "unintentional." A-26. Instead, the panel reasoned that, since James and Hardin conspired to aid M&M in its efforts to disparage Hydrolevel's product and since they acted within the scope of their "apparent authority" from ASME, the organization was strictly liable as a participant in an antitrust conspiracy to restrain trade in violation of Section 1 of the Sherman Act. The panel reached this conclusion even while acknowledging that ASME's putative "agents" never intended to benefit it and acted solely to benefit M&M. Petitioner submits that this holding was incorrect as a matter of law.

A. The Panel's Decision Is Contrary to Prior Decisions of This Court Requiring Actual Authority or Ratification for a Voluntary Organization to Be Held Liable for an Agent's Acts in Violation of the Antitrust Laws.

This Court has expressly ruled that the "apparent authority" of an agent is an insufficient predicate for a principal's liability under the federal antitrust laws. In *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922), a labor union was sued under the Sherman Act for concerted activity having an anticompetitive effect on plaintiff's business. Addressing the question "whether the International Union was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business," *id.* at 393, this Court reversed a verdict in the plaintiff's favor, holding that under agency principles applicable to the antitrust laws, a voluntary organization could not be held liable for the acts of its members absent either actual authority or ratification:

---

was written. PX 14 at p. 184 (HX V. 168; App. 569-70). There was thus no evidence of a motive for Hartford or Hardin to participate in the alleged conspiracy. However, since the contrary conclusion pervades the Second Circuit panel's opinion and is not at issue here, it will be assumed *arguendo* for the remainder of this brief that Hartford and Hardin were participants in the conspiracy in restraint of trade.

> "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively. If the International body had interfered or if it had assumed liability by ratification, different questions would have arisen."

Id. at 395. In *Coronado Coal Co.* v. *United Mine Workers,* 268 U.S. 295 (1925), the case again came before this Court after retrial, during which the plaintiff had introduced further evidence showing that the president of the union had directly encouraged the acts complained of. This Court held that while such evidence might have sufficed to impose personal responsibility on the labor officials involved, it was insufficient to impose liability on the union. The Court held that "it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association." *Id.* at 304.

In the instant case, the panel dealt with the *Coronado Coal* decisions first by misstating their applicability to ASME's argument, and then by proposing artificial grounds for distinguishing them. Instead of discussing *Coronado Coal* in terms of agency liability, the panel phrased ASME's argument as being that "ASME's unique structure or status should mandate a different result" regarding liability. A-18. In fact, while *Coronado Coal* implied that in an antitrust case a voluntary association should be protected by at least as strict a test as that governing business organizations, it squarely held that, in any event, actual authority or ratification, rather than apparent authority, was necessary.

The panel then reasoned that *Coronado Coal* merely "held that an international union may not be held liable for a Sherman Act violation by leaders of a local where, under the constitution of the International, it could only accept authority for the action by express ratification. [268 U.S.] at 304." A-18. This limitation of *Coronado Coal* to instances where an organization "accepts" authority for its members' action is illogical and rejected by precedent. While an entity's internal organization and constitution undoubtedly have bearing on its liability for the acts of its members, allowing an organization to "accept" or decline liability as a matter of choice is hardly sound policy and exalts form over substance, and the only court to address this claimed distinction has so held. In *Truck Drivers Local No. 421* v. *United States*, 128 F.2d 227 (8th Cir. 1942), the Court of Appeals for the Eighth Circuit reversed a verdict in an antitrust prosecution on the ground that a voluntary organization was not liable for the acts of its members absent actual authority:

> "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent agency would not be sufficient to take the matter to the jury, unless the circumstances were so strong as competently to support an inference of actual authority."

Id. at 235. In particular, the Eighth Circuit rejected an argument based on the distinction found dispositive by the panel in this case, namely, that *Coronado Coal* protected only an international with limited constitutional powers but did not apply to a union local, noting that "the difference fundamentally is primarily one of degree." *Id.* at 236.

In short, *Coronado Coal* squarely stands for the proposition that antitrust liability of a voluntary organization can be based on the acts of its members only if the members have actual authority to commit those acts or if the organization ratifies them. In veering so sharply from this precedent, the Court of Appeals committed error that should be reversed by this Court.

B. The Court Below Deviated From Established Precedent That Requires an Intent to Benefit an Organization for It to Be Liable for an Agent's Acts.

Every federal antitrust decision that has addressed the issue of agency liability has held that, absent ratification by the corporate principal, an agent must have intended at least in part to benefit his principal in order for the actions to be within the scope of the agent's employment and to hold the principal liable. In addition, the federal courts have rejected an "apparent authority" standard, without an intent to benefit requirement, as inapplicable to determinations of liability under federal regulatory statutes other than the antitrust laws.

As discussed, in *Truck Drivers' Local No. 421* v. *United States, supra,* 128 F.2d 227, the Eighth Circuit held that in an antitrust case "mere apparent agency would not be sufficient to take the matter to the jury," *id.* at 235, holding, under *Coronado Coal,* that actual authority or ratification was necessary.

The Ninth Circuit, in a criminal antitrust case brought under Section 1 of the Sherman Act, has also addressed the circumstances under which a corporation is liable for its agent's acts. In *United States* v. *Hilton Hotels Corp.,* 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom. Western International Hotels Co.* v. *United States,* 409 U.S. 1125 (1973), the court held that a corporation may be liable even if it did not actually receive the benefit of the agent's acts. The Ninth Circuit squarely held, however, that the corporation would not be liable if the agent intended to benefit only himself or another, since "[a] purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Id.* at 1006, n. 4.

Similarly, *in United States* v. *American Radiator & Standard Sanitary Corp.,* 433 F.2d 174 (3rd Cir. 1970), *cert. denied,* 401 U.S. 948 (1971), the Third Circuit upheld corporate liability under the federal antitrust laws for the acts of an employee on the ground that the agent was "motivated at least in part by a desire to serve" the principal. *Id.* at 204;

see also United States v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978) ("the actions of the [defendant's] agents were taken for the purpose of benefiting the corporation").*

As the panel in this case acknowledged, the principle inherent in these cases—that an organization may be liable for the acts of its agents only if the agents intend thereby to benefit the corporation—is the general agency rule for tort liability. A-13. The *Restatement (Second) of Agency* provides generally that "[a]n act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Id.*, section 235. Similarly, under the *Restatement* a principal is not deemed to have knowledge of events based solely upon the knowledge of an agent if "the agent secretly is acting adversely to the principal and entirely for his own or another's purposes. . . ." *Id.*, section 282(1).

These settled principles of agency liability have been repeatedly emphasized in many contexts in addition to antitrust cases, including suits under other federal regulatory statutes. The many federal courts adopting these agency principles have uniformly rejected the panel's notion of "apparent authority" as a basis for liability and have required that the agent intend to benefit the principal, at least in part. For example, in *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *cert. denied sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969), where the plaintiff brought a fraud action under the federal securities acts, the Court noted:

---

* Likewise, in *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1937), the Court dismissed a federal antitrust complaint on the ground that the complaint did not demonstrate liability of a corporation for the acts of its employees absent their intent to benefit the corporation:

> "If they [the defendant's agents] had improper personal motives and combined to carry them out through the medium of the defendant corporation to the prejudice of the plaintiff, it is conceivable that a common law tort suit might lie against them; but it is difficult to see how that would constitute either restraint of trade or monopoly of trade on the part of the defendant corporation."

Id. at 830.

> "[A]s in other situations governed by agency principles, knowlege of the corporation's officers and agents is not imputed to it when there is a conflict between the interests of the officers and agents and the interests of the corporate principal."

Id. at 211.

Similarly, in *Standard Oil Co. of Texas* v. *United States*, 307 F.2d 120 (5th Cir. 1962), a prosecution under the federal Hot Oil Act, the Fifth Circuit rejected a finding of corporate liability based on an agent's acts since:

> "[T]he purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation. For it is an elementary principle of agency that 'an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' Restatement of the Law of Agency (2d) § 235."

Id. at 128 (footnote omitted).*

---

* *See, e.g., United States* v. *Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) (misdemeanor prosecution under the Bank Secrecy Act; "The acts of an agent may be imputed to the principal . . . but only if it is the agent's purpose to benefit the principal, thus bringing his acts within the scope of his employment."); *Moscarelli* v. *Stamm*, 288 F. Supp. 453, 461 (E.D.N.Y. 1968) (securities case; "It is axiomatic that conduct of an employee not for the purpose of serving the master is not within the scope of his employment (Restatement (Second), Agency, § 235 (1958). . . ."); *Slade* v. *Shearson, Hammill & Co., Inc.*, 79 F.R.D. 309, 313 (S.D.N.Y. 1978) (fraud suit under Securities Exchange Act of 1934; corporation may raise defense "that as a principal it cannot be held chargeable with acts of its faithless employees who committed fraud on the bank in direct conflict with the bank's interest. *See* Restatement (Second) of Agency § 282"); *see also Oman* v. *United States*, 179 F.2d 738, 741 (10th Cir. 1949) (suit under Federal Torts Claims Act); *Steere Tank Lines, Inc.* v. *United States*, 330 F.2d 719, 722-23 (5th Cir. 1963) (violation of Interstate Commerce Commission Regulations); *Ruidoso Racing Ass'n., Inc.* v. *Commissioner*, 476 F.2d 502, 506 (10th Cir. 1973) (civil tax suit); *In Re Investors Funding Corp. of New York*, ___ F. Supp. ___, Fed. Sec. L. Rep. (CCH) ¶ 97,696, at p. 98,654 (S.D.N.Y. 1980) (suit under Securities Exchange Act of 1934).

These principles of agency liability, utilized by the federal courts in both antitrust cases and other actions under the federal regulatory statutes, clearly require reversal of both the panel's decision and jury's verdict. As the appellate panel tacitly accepted, there was no evidence, or even a logical basis for inference, that James or Hardin intended, or could have intended, to benefit ASME by their illicit acts. Rather, both the proof at trial and common sense demonstrate that James and Hardin intended, and could only have intended, to benefit M&M. Accordingly, as a matter of law, ASME should not be held liable for these individuals' acts.

C. The Panel's Decision Erroneously Applies Agency Principles of Vicarious Liability.

In declining to follow the general rule of agency liability, the panel reasoned that:

> "The conduct at issue here, however, is far closer to the torts discussed in [*Restatement (Second) of Agency*] § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement."

A-13. These *Restatement* sections are not only inappropriate to an antitrust case, but are incorrectly summarized by the panel. Comment c to Section 247 (defamation), upon which the panel relied, states that the principal is liable for the acts of an agent "provided that he acts at least in part to serve his employer's purposes." *See Hooper-Holmes Bureau, Inc.* v. *Bunn,* 161 F.2d 102, 104 (5th Cir. 1947) (defamation case; "The defamatory statements made by a servant only for his own purposes, although made during a transaction in which the servant is acting for the corporation, does not subject the corporation to liability"). Similarly, Comment a to Section 248 (interference with business relations) states that an agent's act binds the principal only "if intended for the benefit of the principal or master. . . ." These sections specifically

support ASME's position, and would require reversal of the panel's opinion. Moreover, as noted above (pp. 24-27, *supra*), these exceptional tort principles of vicarious liablity have never been applied in any federal antitrust case, and are implicitly rejected by every federal court that has addressed the issue.

Equally important, the panel misapplied the rationale for allowing liability upon a showing of apparent authority in the very limited category of cases where that principle is followed. The decisions not requiring the agent's intent to benefit the principal, and those few sections of the *Restatement* that adopt this principle, are based upon the concept of reliance: In a limited set of circumstances, a plaintiff should be entitled to rely on an agent's apparent authority, and for this reason the principal is liable for the agent's acts, *to a plaintiff who so relies,* irrespective of the agent's motive. The theory of apparent authority, as set forth in the *Restatement (Second) of Agency* at section 8, is that when the agent's authority has been directly communicated by the principal to a third party, the principal is bound by his communication from denying authority as to that third party.

This was emphasized by the Seventh Circuit in *Sennott* v. *Rodman & Renshaw,* 474 F.2d 32 (7th Cir.), *cert. denied,* 414 U.S. 926 (1973), a suit under the federal securities acts. There, after a brokerage house had been found liable for the acts of one of its agents, the Seventh Circuit reversed because the trial court had erroneously proceeded on a theory of apparent authority in the absence of any showing of reliance:

> "Under Sennott's theory of apparent authority or estoppel, therefore, plaintiff would be required to prove that he was relying upon [the agent's] apparent authority, and hence on [defendant] Rodman, when he decided to purchase the Skyline options. Reliance is not evident from the record before us."

Id. at 38; *see also Asphalt Industries, Inc.* v. *Commissioner,* 384 F.2d 229, 234 (3rd Cir. 1967) (tax fraud suit; judgment reversed because "there is no innocent third party who dealt

with the corporation in reliance upon [the agent's] authority. . . ."). Liability based upon apparent authority, in which intent to benefit the principal was not shown, has been upheld only in cases where reliance by the plaintiff on the agent's apparent authority was demonstrated. *See, e.g., Community Bank, Lake Oswego* v. *Bank of Hallandale and Trust Co.*, 482 F.2d 1124, 1126-27 (5th Cir. 1973) (common law fraud case; plaintiff relied upon apparent authority of bank officer). In such cases, a crucial element has been that plaintiff himself relied upon the manifestation of authority given by the defendant.

The element of reliance clearly has no application to the antitrust laws generally and is not present in the instant case in any event. First, it is logically anomalous to apply a theory of apparent authority (and its attendant additional element of direct reliance) to laws governing restraint of trade or monopolization, which are designed to protect the marketplace as a whole rather than the individual rights of a specific business. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("[t]he antitrust laws, however, were enacted for the protection of *competition*, not *competitors*" citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)) (emphasis in original).

Second, Hydrolevel never even saw the April 29, 1971 letter until after the putative damage was done and obviously did not "rely" on the apparent authority of Hardin. As one commentator has noted, apparent authority as a basis for liability is available "only to those by whom the misleading manifestations [of authority] are received." Seavey, *Agency* § 8, p. 14 (1964).* Conversely, even if one were to assume

* The panel noted that the "difference from the usual situation in which the injured party relies directly on the culpable misrepresentations can hardly be material." A-14. Its sole support for this curious statement was *Ricketts* v. *Pennsylvania Ry. Co.*, 153 F.2d 757 (2d Cir. 1946). The issue in *Ricketts* was whether a tort plaintiff was estopped by a release his lawyer had fraudulently induced him to sign. The Court held that he was not, but "assumed" that if the plaintiff had given the attorney actual authority to settle the claims he would have been so bound. *Id.* at 759. Needless to say, this dictum has no bearing on the issues in this case and has never been applied in any antitrust decision.

that prospective purchasers of Hydrolevel's device did rely on the apparent authority of Hardin to cause the issuance of the April 29 letter, those putative victims were not parties to this suit. Finally, potential customers relied upon M&M's misapplication and distortion of the letter as part of its deliberate campaign (in which ASME took no part) to disparage Hydrolevel's proprietary device. Any reliance, even by non-parties to this action, was thus once removed from ASME; as to Hydrolevel, putative reliance was twice removed. Accordingly, even were the principle of reliance to be deemed applicable to antitrust actions, contrary to all prior precedent, it would nonetheless be inappropriate in this case.

Rather than following this Court's decisions in *Coronado Coal, supra,* the panel purported to follow *Gleason* v. *Seaboard Air Line Railway Co.,* 278 U.S. 349 (1929), in holding an organization liable for unauthorized, disloyal acts of employees. A-13 to A-14. The panel's application of that decision in the context of the antitrust laws and under the facts of this case is mistaken. *Gleason* involved a suit for liability on a bill of lading, and involved interpretation of the federal Bill of Lading Act. *Id.* at 355, 357-58. The reasoning in *Gleason* implicitly encompassed the concept of reliance on "apparent authority" by innocent third parties. *Id.* at 357 ("injury to him who deals with the agent. . . ."). And, while the panel noted that *Gleason* has "not been questioned" (A-14), it is more relevant that it has never been followed in any antitrust case and, indeed, has rarely been followed at all.*

---

* *Gleason* has primarily been followed in state court common law fraud proceedings, often involving bills of lading. *See, e.g., Lucas* v. *Ligett & Myers Tobacco Co.,* 50 Hawaii 477, 481, 442 P.2d 460, 463 (1968); *Gartin's Grocery* v. *Lucas County Co-operative Creamery Ass'n.,*231 Iowa 204, 207, 1 N.W. 2d 275, 278 (1941); *Shrier* v. *Morrison,* 357 P.2d 196, 201 (Sup. Ct. Okla. 1960); *Ripon Knitting Works* v. *Railway Express Agency,* 207 Wis. 452, 454, 240 N.W. 840, 842 (1932). The federal courts have infrequently cited to *Gleason* since its decision in 1929, much less followed it.

Furthermore, several federal decisions which have discussed *Gleason* have—contrary to the panel's conclusion—at least implicitly "questioned" it, by requiring that a misbehaving agent be acting with an intent to benefit his principal in order for the principal to be held liable. *See, e.g., Oman* v. *United*

The principle enunciated in *Gleason*, and perhaps the ultimate rationale underlying it, is that in certain limited circumstances the principal is better able to prepare against and bear the risk of loss.* For example, in *United States* v. *Ridglea State Bank*, 357 F.2d 495, 499 (5th Cir. 1966)—upon which the panel in the instant case purported to rely (A-16 to A-17)—the Court noted the following:

> "In a civil action to recover actual damages for an agent's misrepresentation done without intent to benefit his employer, liability is imposed upon the employer not only because the third party reasonably thought that the agent was acting for the employer, see *McCord* v. *Western Union Telegraph Co.*, 39 Minn. 181, 39 N.W. 315 (1888), and perhaps because the imposition of liability will encourage more careful supervision of employees by employers, see Morris, The Torts of an Independent Contractor, 29 Ill. L. Rev. 339, 341 (1934), but also because the third person has suffered loss which the employer is better able to bear and to spread than is his agent, see *Gleason* v. *Seaboard Air Line R'y, supra.* This last reason has been called 'the real reason for employer's liability.' Baty, Vicarious Liability 154 (1916)."

Id. at 499.

States, supra, 179 F.2d at 741 (10th Cir. 1949) (suit under federal Torts Claims Act; "principal is not liable to third persons for torts committed by his agent acting outside his employment. If the agent goes outside his employment and acts not in furtherance of the principal's business, but to effect some purpose of his own, the principal is not liable."); *Ruidoso Racing Ass'n., Inc.* v. *Commissioner, supra,* 476 F.2d at 506 (10th Cir. 1973) (civil tax suit; "The pertinent questions are . . . whether the agent was acting in behalf of and not against the corporation with the result that the corporation benefited from his fraudulent acts.").

* As one commentator noted, its holding is "perhaps best explained" on the ground that the principal's involvement "in commerce makes it fair to impose liability on the carrier." Seavey, *Agency* § 92, p. 164-65, n. 57 (1964); *cf., Elgie & Co.* v. *S.S. "S.A. Nederburg,"* 74 Civ. 5112 (GLG), Slip op. (S.D.N.Y. Aug. 30, 1978).

Petitioner submits that the panel erred in applying this "risk of loss" analysis in the context of the antitrust laws and under the facts of this case. Neither *Gleason* nor *United States* v. *Ridglea State Bank, supra,* have ever been applied in a case involving anything other than recovery of actual damages. Indeed, in *Ridglea State Bank* itself, the Fifth Circuit acknowledged a distinction between civil actions to recover actual damages and suits for punitive or deterrent damages. The Court held that since civil suits under the federal False Claims Act provided for double damages, a stricter test of vicarious liability should be applied, and it reversed a judgment in favor of the Government for failure to show the intent of defendant's agents to benefit their employer. *Id.* at 498-500.

Subsequently, the Court of Appeals for the Fifth Circuit clarified the agency test that it had enunciated in *Ridglea State Bank,* discussing its application to punitive damages suits, such as antitrust actions, in the following terms:

> "The distinction we make here is a well established one—drawn between suits which seek to impute an agent's fraud or guilty intentions to his principal, and suits which seek to allocate the loss resulting from an agent's fraud between the principal and innocent third parties. Two considerations operate to create the distinction. The first is whether the action seeks to impute any evil intent to the principal in a way that would result in punitive consequences to the principal. When the action would have such consequences, then clearly, if the actions of the agent were unauthorized, committed without the principal's knowledge and for no benefit to the principal, the principal should not be held responsible. The types of cases in which we find this rule applied are usually criminal cases, *or cases having some punitive consequences.* See *United States* v. *Ridglea State Bank,* 5th Cir. 1966, 357 F.2d 495, 498-499."

Bankers Life Insurance Co. of Nebraska v. *Scurlock Oil Co.,* 447 F.2d 997, 1004-05, n. 12 (5th Cir. 1971) (emphasis

added).* Thus, in holding that a voluntary association is liable for the undisclosed and disloyal acts of a volunteer member, the panel chose the broadest possible test for vicarious liability found in the law of torts and—against all precedent—erroneously transplanted it to punitive treble damage actions.

Moreover, the panel's reliance on a "risk of loss" analysis misallocates the burden for compensating a third party harmed by an ill-intentioned agent's acts. Under the reasoning of the cases discussed above, the rationale for transferring the "risk of loss" to a principal is that "the third person has suffered loss which the employer is better able to bear and spread than is his agent . . . ." *Ridglea State, supra,* 357 F.2d at 499. In *United States* v. *Hilton Hotels, supra,* the Court observed with respect to Sherman Act violations, which are "motivated by a desire to enhance profits," that a corporation may bear the risk of loss caused to third parties by its agents because it stands to profit by the agents' activity:

---

* Although the panel reasoned that an antitrust violation is akin to a mere "variety of business tort . . . remedied through restitution," that the "trebling of damages under the antitrust laws reflects congressional recognition of the difficulty of proving antitrust damages," and that there is "no reason why the treble damage provision of the Clayton Act should compel a restricted view of agency law" (A-17 to A-18), every Court addressing the issue has concluded to the contrary that antitrust damage suits constitute a punitive measure. *See, e.g., Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, ___ *U.S.*___, 49 U.S.L.W. 4537, 4640 (May 26, 1981) ("The very idea of treble damages reveals an intent to punish . . . ."); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751 (1947) ("retribution"); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) ("treble the damages actually suffered"); *Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.) (L. Hand, J.), *cert. denied*, 350 U.S. 825 (1955) ("two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose"); *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F.2d 877, 883 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 251 (1946) (treble damage provisions a "penalty"); *Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936) ("symbol of punishment"); *see also* 2 Areeda & Turner, *Antitrust Law* 34 (1978) ("treble damages are indisputably punishment. Accordingly, they should not be awarded in the absence of factors similar to those justifying criminal sanctions").

> "[V]iolations of the Sherman Act are a likely consequence of the pressure to maximize profits that is commonly imposed by corporate owners upon managing agents and, in turn, upon lesser employees .... And if a violation of the Sherman Act occurs, the corporation, and not the individual agents, will have realized profits from the illegal activity."

467 F.2d at 1006; *see also American Radiator, supra,* 433 F.2d at 205; *Bankers Life Insurance Co. of Nebraska, supra,* 447 F.2d at 1004-05, n. 12.

Application of such an analysis to the present case emphasizes the absurdity of the panel's decision. Both as a matter of proof and of simple logic, a non-profit voluntary professional association like ASME did not and could not under any circumstances benefit, or "profit," from the disloyal acts of James and Hardin. Only the commercial entities that were the true principals of James and Hardin could conceivably have benefited from their acts. Indeed, in the instant action, James and Hardin actually were acting as agents of the true beneficiaries of their misdeeds, M&M/ITT and Hartford, rather than as agents of ASME, which was merely an unwitting vehicle in M&M's anticompetitive scheme.

Under these circumstances, neither precedent nor policy suggest any reason why ASME should bear the "risk of loss" for the disloyal volunteers' acts. Simply because Hydrolevel chose to settle with ITT (M&M) and Hartford prior to trial does not diminish the windfall nature of any further recovery against ASME. Rather, M&M/ITT and Hartford, the real instigators and only benefactors of the restraint of trade, not only stand in the best position to bear any loss that might have been suffered, but should be the only entities liable for their agents' acts. Under legal principles as old as the adage that "no man can serve two masters," 6 Matthew 24, and emphasized in every decision that has addressed the issue, it necessarily follows that ASME should not be held liable for

the conspiratorial acts of ill-intentioned volunteers intended to benefit their employers.*

In summary, the theory of vicarious liability based upon "apparent authority" adopted by the Second Circuit in this case has been rejected not only in every antitrust case reaching the issue but in federal court decisions interpreting other federal regulatory statutes as well. More fundamentally, the appellate panel upheld liability on the basis of an exceptional and draconian standard that has no logical or practical application to the antitrust laws or to the facts of this case. This Court should reverse this holding.

---

* Indeed, following the conclusion of the trial, the District Court judge noted: "If they [the jury] could have had ITT [M&M] as a party, I think lightning would have gone to ITT. Unfortunately, they didn't have them. They only had [ASME]." Transcript of Feb. 26, 1979 hearing, at 6 (*see* AX V. 221).

POINT II

THE COURT OF APPEALS ERRED IN UPHOLDING ANTITRUST LIABILITY ON THE BASIS OF NEGLIGENT "UNINTENTIONAL PARTICIPATION" IN AN ANTITRUST CONSPIRACY

The panel's opinion is also inconsistent with this Court's decisions requiring intentional, purposeful participation in an antitrust conspiracy. This Court's decisions in *Coronado Coal, supra,* not only provide the standard for holding a principal liable for the acts of its agents, but also establish a rational basis for imputing to the principal the conspiratorial knowledge and intent that this Court has repeatedly recognized as an essential element of an antitrust conspiracy. The panel's "apparent authority" theory provides no such basis; indeed, the panel candidly conceded as much, finding ASME liable for "unintentional participation" in the conspiracy. A-26. The panel did not find that ASME knew of any illicit acts or intended to participate in them; rather, it apparently based ASME's liability on a theory of negligence, holding that since ASME failed adequately to supervise the acts of its volunteer members, it was strictly liable for their anticompetitive conduct.

The key to the panel's decision, that ASME's failure to detect and deter James' and Hardin's conduct violated the antitrust laws, is the following passage in the opinion:

> "While ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences."

A-16; *see also* A-6 to A-7. This statement is not only factually incorrect, but it clearly reflects a negligence standard for allocating the risk of damages to ASME regardless of its intent or knowledge.*

This Court has held on numerous occasions, however, that an antitrust conspiracy, whether under Section 1 or Section 2 of the Sherman Act, requires an intentional, purposeful agreement:

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."

American Tobacco Co. v. *United States*, 328 U.S. 781, 810 (1946); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons., Inc., supra*, 340 U.S. at 213 (requirement that conspirators have "a unity of purpose or a common design and understanding"); *see also United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966) ("joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan"). These decisions reflect the inherent nature of a conspiracy: one cannot be held liable for the acts of others unless one intends to act jointly with them and has knowledge of at least some of the illicit purposes of the joint venture. *See*

* The statement may also reflect the panel's belief that imposing liability on ASME would encourage more careful supervision by ASME of its volunteer members. However, this view also lacks factual support. As noted above, the panel appeared to believe that Hardin issued the April 29 letter acting entirely alone and "without any check or supervision." A-16. In fact, however, Hardin's draft of the April 29 letter was sent to both the Chairman and the Vice-Chairman of the B-PV Committee for review before release by the Secretary of the Committee. AX V. 6; J.A. 63. The letter passed review by those individuals—and undoubtedly would have escaped detection under any system—precisely because no one unaware of the drafter's ulterior purpose could possibly have detected the letter's hidden significance. M&M's request was limited to advice concerning a cut-off that operated *after* water had left the gauge level required for safe operation. Therefore, the April 29 letter was an accurate response to the question presented; its misleading potential could be discerned only by one who knew of M&M's conspiratorial purposes. *See* pp. 7-10, *supra*.

generally, United States v. *United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

This Court has never allowed a finding of antitrust liability to be based upon a negligence theory, as the panel apparently did in this case. Indeed, liability on the basis of negligence is squarely inconsistent with a requirement of intentional, knowing participation in a conspiracy. Thus, the panel's decision to allow liability for activity of which ASME had no knowledge not only conflicts with this Court's holdings in *Coronado Coal* and the other precedents cited, but undermines the requirement of intentional participation in an antitrust conspiracy. Viewed against this legal background, it is overwhelmingly clear that whatever the conspiratorial designs of M&M, James, or Hardin, ASME never belonged in this case.

Throughout this action, Hydrolevel has filed briefs and memoranda of law that purported to demonstrate its theory of the case. Almost without exception, every case cited in these papers—and indeed, virtually all decisions upholding an antitrust conspiracy—involved illegal arrangements among business partners or competitors, each of whom stood to benefit from the exclusion of or limitations placed upon a competitor, or of a true trade association which (unlike ASME) is composed of business concerns with a common economic interest. The classic examples of such improper arrangements are horizontal price fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), vertical price fixing, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), territorial allocation of markets, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899), and group boycotts, *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc.* v. *People's Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941). None of these decisions even remotely applies to this case. Unlike the defendants in all the cited cases, ASME had no economic

relationship with any of its alleged co-conspirators, and it had absolutely no prospect of economic gain from a successful exclusion of Hydrolevel as a competitor.

In a conspiracy case, whether under Section 1 or Section 2 of the Sherman Act, the plaintiff bears the burden of showing that the defendant deliberately and intentionally participated in an agreement to restrain trade or to monopolize. In the absence of such a showing, the courts have routinely dismissed complaints for failure of proof or reversed verdicts for insufficiency thereof.* Furthermore, given ASME's absolute lack of any financial motive to participate in M&M's conspiracy, the jury could not properly have inferred participation by ASME.

It is true, of course, that the "the determination of whether a conspiracy existed almost inevitably rests on the inferences that may fairly be drawn from the behavior of the alleged conspirators," *Michelman* v. *Clark-Schwebel Fiber Glass Corp., supra,* 534 F.2d at 1043, and that the plaintiff need not show a written agreement or an explicit oral understanding. *American Tobacco Co.* v. *United States, supra,* 328 U.S. at 809. However, this Court has expressly noted that while a court may draw inferences of complicity from concerted behavior of parties having a motive to conspire in

* *See, e.g., Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042-43 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); *American Telephone and Telegraph Co.* v. *Delta Communications Corp.*, 408 F. Supp. 1075, 1087-88 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978), *cert. denied sub nom. Delta Communications Corp.* v. *National Broadcasting Co.*, 444 U.S. 926 (1979); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *National Auto Brokers* v. *General Motors Corp.*, 572 F.2d 953, 959-60 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *International Railways of Central America* v. *United Brands Co.*, 532 F.2d 231, 239 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Modern Home Institute, Inc.* v. *Hartford Accident and Indemnity Co.*, 513 F.2d 102, 112-14 (2d Cir. 1975); *DuPont Glore Forgan Inc.* v. *American Telephone and Telegraph Co.*, 437 F. Supp. 1104, 1111-1113 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *Miller* v. *Schweickart*, 413 F. Supp. 1062, 1065 (S.D.N.Y. 1976) (Weinfeld, J.); *United States* v. *Standard Oil Company*, 316 F.2d 884, 890 (7th Cir. 1963).

restraint of trade, such inferences may not be drawn when the parties lack the economic incentive to conspire. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288 (1968); *see also International Railways of Central America* v. *United Brands, supra,* 532 F.2d at 239-242; *Michelman* v. *Clark-Schwebel Fiber Glass Corp., supra,* 534 F.2d at 1042.

In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), this Court held that when CBS cancelled an affiliation agreement with a UHF station in the Milwaukee area, which led to a monopoly of the UHF market by CBS, the cancellation alone allowed an inference that CBS harbored a conspiratorial motive. In contrast, in *First National Bank of Arizona* v. *Cities Service Co., supra,* the Court distinguished *Poller* on the ground that in *Poller* the parties had a motive to reach an illegal agreement. Noting that "in this case, as [plaintiff] has admitted right along, the business relationship between him, Cities, and the other defendants was such that it is much more plausible to believe that Cities' interest coincided rather than conflicted, with those of petitioner," the Court ruled that the "inferences of motive that can reasonably be drawn from the facts" did not support a claim of conspiracy. *Id.*, 391 U.S. at 285, 287.*

Rather than revealing any intent to restrain trade, ASME's activities were clearly designed to fulfill the Society's laudable objectives. Even with respect to groups which, unlike ASME, are composed of members having a common economic interest—such as classic trade associations—this Court and other federal courts have consistently ruled that the activities of such a group will be allowed

* The Court's further observation that the plaintiff "is unable to point to any benefits to be obtained by Cities from refusing to deal with him and, therefore, the inference of conspiracy sought to be drawn from Cities" 'parallel refusal to deal' does not logically follow," *id.* at 287 (footnote omitted), precisely characterizes the present case. *See also Loom Crafters, Inc.* v. *New Central Jute Mills Co. Ltd.*, 1971 Trade Cases (CCH) ¶ 73,734 at p. 91,071 (S.D.N.Y. 1971) (Lasker, J). ("It is true that proof of motive is not required to establish a case of conspiratorial conduct [citations omitted], but where the case rests solely on inferences based on circumstantial evidence the failure to offer a credible theory of motivation weighs heavily against the plaintiff.").

considerable latitude unless they reflect an intent to restrain trade. Beginning with *Maple Flooring Manufacturers Association* v. *United States,* 268 U.S. 563 (1925), this Court and the lower federal courts have ruled that a Sherman Act violation could not be inferred, even from the activities of a trade association, unless

> "the court either can infer from this course of conduct a specific and continuing purpose or agreement or understanding on their part to do acts tending to effect an actual restraint of commerce [citation omitted], or unless, on the other hand, it is established that the combination entered into by the defendants in the organization of the defendant association, and its activities as now carried on, must necessarily result in such restraint."

Id. at 577.* *See, e.g., Hatley* v. *American Quarter Horse Association,* 552 F.2d 646 (5th Cir. 1977); *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee,* 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); *Structural Laminates, Inc.* v. *Douglas Fir Plywood Association,* 261 F. Supp. 154 (D. Ore. 1966), *aff'd,* 399 F.2d 155 (9th Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969). Since ASME is not a trade association and since its individual members have no economic motive for joint anticompetitive activity, the failure of the plaintiff's case follows *a fortiori* from these cases.

In sum, both the panel's novel application of an "apparent authority" theory to antitrust cases and its reliance on a negligence standard of "unintentional participation" are erroneous. Particularly under the circumstances presented, it

---

* Of course, this Court has on a number of occasions found a trade association liable under the antitrust laws *when it intentionally restrained trade* by coordinating the economic activities of its members or by excluding competitors. *See, e.g., Eastern States Retail Lumber Dealers Ass'n* v. *United States,* 234 U.S. 600 (1914); *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939); *Fashion Originators Guild of America* v. *FTC,* 312 U.S. 457 (1941). In each of these cases—upon which Hydrolevel expressly relied in its trial brief—the Court found a motive on the part of the association to restrain trade and an intent to do so, both of which are completely lacking here.

follows from this not only that the judgment of the Court of Appeals should be reversed, but that this Court should remand with directions to dismiss the complaint. In the absence of any showing of actual, intentional participation in an antitrust conspiracy by ASME, Hydrolevel's only remaining theory of liability was its allegation that ASME somehow "ratified" the conspiracy of M&M, James and Hardin after its commission. Although the Court of Appeals did not formally decide this issue, it expressly stated in the damages portion of its opinion that:

> "The June 1972 letter was a retraction of the April 1971 interpretation. . . . As ASME's sole contribution to the conspiracy was the April 1971 letter, a suitable retraction . . . was all that was required to free it from further liability for any damages caused by the conspiracy."

A-23. Indeed, there is absolutely no support in the record for Hydrolevel's "ratification" theory, since ASME obviously did nothing to perpetuate the impact of the April 1971 letter once it learned of it, and, as the Court of Appeals expressly found, issued a "suitable retraction." Since Hydrolevel is left with no viable theory for affirming the judgment of liability, the case should be remanded with directions to dismiss the complaint.

POINT III

THE PANEL'S DECISION IS ALSO WRONG AS A MATTER OF POLICY AND WILL HAVE A DISASTROUS EFFECT ON MANY VOLUNTARY ORGANIZATIONS WHICH SERVE THE PUBLIC INTEREST

As demonstrated by the foregoing, the Second Circuit panel has departed from all relevant precedent and enunciated a new standard for vicarious liability under the antitrust laws that is simply wrong as a matter of law. In addition, the application of this new standard to non-profit, voluntary membership organizations, such as ASME, is ill-advised as a matter of policy.

In reaching its decision, the panel inaccurately depicted ASME, on several occasions, as a trade association (A-15 to A-16), and thus failed to consider the role that organizations like ASME actually play in the life of our nation. At least partially as a result of this, the panel also mistakenly concluded that organizations like ASME should bear the risk of loss for any harm caused by wrongful acts of their volunteer members, even when the acts are intended to benefit third parties and are undertaken without the knowledge or consent of the organization. Neither the panel's depiction of ASME nor its conclusion regarding ASME's liability withstands scrutiny.

As previously noted (pp. 2-3, 20-21, 40-41, *supra*), ASME is not a trade association representing the interests of a particular industry or group of business concerns. Rather, it is a scientific and technical association which draws its 100,000 individual members from all segments of society in which mechanical engineers are active. ASME, and similar organizations, exist to serve the public interest rather than the common business interests of their members.

Coming together as volunteers, ASME's diverse membership develops mechanical engineering codes and standards designed to enhance public health and safety, improve

product reliability and facilitate the free flow of commerce.* It has been estimated that such voluntary activities annually mobilize and effectively channel over $320 million worth of manpower and talent for the public good. *See* Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety and Health," 56 *Texas L. Rev.* 1329, 1332 n. 4 (1978). "[F]or government to undertake the responsibility for all this work would not only significantly increase the direct cost of government but would divert from their main occupations a significant portion of the nation's talented technicians." Wachtel, "Products Standards and Certification Programs", 13 *Antitrust Bulletin* 1, 7 (1978); *see generally* Hamilton, *supra,* 56 *Texas L. Rev.* at 1329-1484; Hogan, "In Defense of Voluntary Products Standards," *MBA* (April 1978); Lange, "Steps to Standards," *Association Management* 6 (August 1965).

More fundamentally, the role and profound importance of voluntary organizations like ASME has been a part of the American system since the founding of the republic. *See* DeTocqueville, *Democracy in America,* Chapter 29 (Mentor ed. 1956). Voluntary groups serving the public interest—bar associations, doctors, accountants, engineers, architects and scientific groups, to name just a few—mobilize and effectively channel billions of dollars worth of manpower and talent for the overall public good. Through the voluntary efforts of these organizations, the quality of life in America is enhanced in a number of ways: through improved public safety and product reliability, greater availability and wider dissemination of appropriate equipment and procedures for industry, better educated professionals for the work force of the country, and maintenance of high ethical and professional

* The strong federal policy of encouraging and fostering voluntary development of safety and performance standards is reflected by Office of Management and Budget Circular No. A-119, 45 Fed. Reg. 4326 (January 21, 1980). The Circular specifically encourages the participation by government employees as professional volunteers on standards writing committees and the reliance by executive branch agencies upon these voluntary product standards for procurement and regulatory purposes, whenever possible.

standards. In no other way has any nation been able to bring so much volunteer talent and dedicated individual effort to the advancement of technology and improvement of the quality of life without undesirable government intervention.

Against this background, the panel's holding is particularly inappropriate. In holding ASME liable for "unintentional participation" in an antitrust conspiracy as a result of the disloyal acts of two volunteer members, the panel has fashioned a new standard of liability which, in effect, makes all such organizations the guarantors of the good faith of their volunteer members. This rule, if allowed to stand, will be literally devastating to any voluntary membership organization that has the misfortune to be deceived by one or more of its members. While instances of abuse, such as in this case, are certainly rare,* a single treble damage antitrust verdict could easily force any non-profit voluntary membership organization out of existence. The chilling effect which this new standard will have on the activities and programs of the many voluntary and professional groups which serve our society is evidenced by the many *amicus curiae* briefs filed in this action.**

Any voluntary membership organization can be maneuvered by a disloyal member familiar with its procedures into innocently taking a position capable of misuse by a third party. It takes no great feat of imagination to foresee situations where, as here, a disloyal member of such an organization actively deceives it and secretly allows a third party to misuse its purpose, goals and procedures for another's benefit. In effect, the panel's opinion makes a voluntary organization strictly liable for antitrust penalties if a member has a piece of official stationery, a position in the

---

* ASME has been promulgating and maintaining voluntary safety standards for nearly one hundred years without a single prior instance of abuse of its procedures like that present in this case. The innumerable other professional organizations, of which the *amici curiae* referred to below are representative, have maintained similar exemplary records.

** *Amicus curiae* briefs in support of ASME's petition for certiorari were filed by fifteen voluntary professional organizations concerned about the impact of the Circuit Court's decision on their programs and activities.

organization providing "apparent authority," and the guile to misuse both for his own ends. Subjecting otherwise innocent public service organizations to the awesome penalties of a treble damage award for failing to ferret out or detect such disloyalty is both unprecedented and unwise.

Of equal importance is the fact that the panel's decision misallocates the burden for compensating a third party harmed by an ill-intentioned volunteer's acts. As previously noted, the panel's reliance on *Gleason* v. *Seaboard Air Line Railway Co., supra,* and its apparent rationale for transferring the "risk of loss" to a principal, is clearly inappropriate in this case (*see* pp. 30-35, *supra*). The panel's decision is erroneous for public policy reasons as well. Unlike business corporations, which profit from the acts of their agents and necessarily urge them to maximize such profits, ASME and other non-profit entities are not "better able to bear and to spread," *United States* v. *Ridglea State Bank, supra,* 357 F.2d at 499, the risk of loss in cases such as these. Not only are such non-profit corporations in a far more vulnerable financial position than their profit-making counterparts, but the ultimate effect of any judgment will be upon the capacity of these organizations to serve the public weal rather than upon private investors who benefit from a profit-making corporation's activities.

We do not argue that non-profit, voluntary associations, such as ASME, should be immune from antitrust liability;* we suggest only that holding such an organization strictly liable in treble damages for the unauthorized and unratified acts of volunteer members, that are not taken in furtherance of the organization's objectives or otherwise to benefit the organization, is unprecedented as a matter of law and unwise as a matter of policy. The risk of loss should be placed squarely upon those who explicitly authorized and stood to

* Indeed, ASME has previously entered into a consent decree with the U.S. Department of Justice, by which it agreed to modify its accreditation procedures in regard to foreign manufacturers, in order to ensure compliance with the Sherman Act. *See United States* v. *ASME and National Board of Boiler and Pressure Vessel Inspectors,* 1972 Trade Cases (CCH) ¶ 74,028 (S.D.N.Y. 1972).

profit from the nefarious activity—in this case, James and Hardin and their true principals, ITT/M&M and Hartford.

The panel should have followed the decisions of this Court and the other federal courts and required a showing either that James and Hardin intended to benefit ASME or that ASME knowingly acquiesced in or ratified their acts. In escalating the potential liability of non-profit, voluntary professional associations to allow treble damages under the antitrust laws for "unintentional participation" in the misdeeds of others, the panel has undermined public policy by placing on the backs of all such organizations a potentially insuperable and entirely inappropriate burden. This ill-reasoned new standard of vicarious antitrust liability is wrong as a matter of both law and policy, and grossly extends the federal antitrust laws beyond their proper moorings.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be reversed and the complaint dismissed.

Respectfully submitted,

HAROLD R. TYLER, JR.
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000

Attorney for The American Society of Mechanical Engineers, Inc.

Of Counsel:

RICHARD D. PARSONS
FREDERICK T. DAVIS
STEVEN C. CHAREN
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112

Dated: July 30, 1981